REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLENEOUS CRIMINAL APPLICATION NO 67 OF 2019.

LESIIT,J

LUKE JUMBA AVINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

1. The Applicant has approached this court by way of a Misc. Criminal Application in which he filed a Chamber Summons application and a Supporting Affidavit. The Chamber Summons is dated as filed on the 7th February, 2019. It has not invoked any law. It seeks two orders:

> **i. That this court be pleased to grant re-sentencing hearing in the decision of the high Court dated 22nd June, 2010 by Hon. L. J. Lesiit.**
>
> **ii. That the court be pleased To receive mitigation from the Applicant for consideration of an appropriate sentence devoid of the mandatory death sentence, which has been declared unconstitutional by the Supreme Court of Kenya.**
>
> **iii. May this court be pleased to issue any other order that it may deem fit in the interest of justice.**

2. The supporting affidavit is sworn by the Applicant. In it he states that he was convicted by this court in **Nairobi High Court Criminal Case No. 58 of 2009**, and sentenced to suffer death. He deposes that the death penalty was declared unconstitutional in **Supreme Court Petition No. 15 of 2015**, and seeks this court to be so persuaded and grant a different sentence. He avers matters of law which I have also considered.

3. The Applicant has also filed a Petition in which he avers that he is not challenging the conviction meted by the trial court in his trial, but the sentence alone based on the Supreme Court decision in **Petition No. 15 of 2015**. He has also invoked **Articles 2 (4), 3, 22 (1),** and **50 (2) (p)** of the constitution and **Section 333 (2)** of the **Criminal Procedure Code** which deals with the period an accused was held in custody should be considered while passing sentence.

4. The Applicant has also filed Mitigation which I have considered in detail. In brief he urges that he regrets his actions, which he said were as a result of unprecedented thinking which occurred within a minute. Secondly, he urges that he is apologetic to the Court, the criminal justice system and to God for the inconvenience of trying him and determining his case, adding that the court rightfully arrived at the finding that he committed the offence and punished him for it.

5. The Applicant urges that a precious life was lost which ought not to have been lost and claims that the fight was a domestic scuffle. He claims that it is the deceased who accosted him as he went home with his wife. That is however not correct, it was the Applicant who attacked the deceased as he went home with the wife of the Applicant. Besides, as the court found, and I was the trial judge, there was pre-meditation as the Applicant way laid the two at a spot as they walked home from work. I however note that the application does not open up issues of conviction, therefore the matter rests there.

6. The court called for and considered the Probation Report on Re-sentencing. In brief the sentiments of the deceased family are not included as the family was not traced. Efforts made to trace them are indicated in the Report. It is unfortunate that the deceased family could not be found. The court would have been desirous to know their views, and also find out the hardship felt or suffered by them following his demise.

7. The daughter of the Applicant was interviewed and she expressed a strong desire to be re-united with her father. The same sentiments were expressed by a brother to the Applicant. The Assistant Chief of Changoo Sub-location where the Applicant comes from gave a positive

report about the Applicant as well as his family, and indicated that no threat will be posed to the community if the Applicant is released.

8. The deceased was living with the wife of the Applicant at the time of the incident. The Applicant's wife told the Probation officer that the Applicant had given her a hard time, tarnish her name in the community in Nairobi where they lived, as well as attacking her with stones whenever they met. She said that after his imprisonment the Applicant had reached out to her for forgiveness and that after deep consideration, she decided to forgive him unconditionally.

9. I did consider the statement that the Applicant gave to the Probation Officer. It is an accurate account of what happened on the material day. He even admitted stabbing the deceased with a metal rod in his stomach, which was the cause of death. The Applicant also informed the Probation Officer that he regrets his actions and his inability to control his anger at the time.

10. Flowing from the above, the circumstances of the offence are still clear to my mind. On the one hand the deceased moved to live with the family of the Applicant, his wife and 7 children. The Applicant's wife claimed that the deceased was a Pastor, and that he slept on a sofa set in the sitting room. On the other hand, the Applicant was estranged to his wife and appears not to have supported his family at all.

11. Never the less, it appears that the deceased had taken over the wife and 7 children of the Applicant at the time of the incident, even though it is not clear whether they were living as man and wife, it is none the less a conduct to be frowned upon. Especially considering that he regarded himself a Pastor. The Applicant had no right to take his life, especially after way laying him as he did, proof of pre-meditation. The court does not however be little his plight to see his family apparently taken over by someone else.

12. I have considered that the Applicant has been in custody since his arraignment in court on 3rd July, 2009. That is 10 years and 8 months now. He does not deny the offence, says that he regrets is actions and the resultant loss of life. He impresses the court as one who is remorseful for the offence.

13. I have considered that the Applicant is 68 years old. That is quite a ripe age. I have noted from the original file that the Applicant's appeal was never forwarded to the Court of Appeal. In fact, it was not admitted for the appeal and the papers still lie in the file.

14. This is a re-sentencing application, and is based on the Supreme Court judgment in **Francis Karioko Muruatetu & another v Republic (2017) eKLR**. That judgment gave jurisdictions to courts to receive applications for re-sentencing by persons who had been convicted of offences with mandatory penalties, and who had been sentenced to mandatory sentences. That gives this court the jurisdiction to re-consider the sentence in this case, which I concluded as a trial court on 22nd October 2010, and passed the death sentence on the Applicant, being a mandatory sentence for murder for which he was convicted. In that case, the Court had the following to state:

> **"We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness."**
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> **"If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict."**

15. I have taken into account the guidelines given in by the Supreme Court directions in the said judgment. **[Francis Kariko Muruatetu and Another versus Republic]** (supra). It is a guiding judgment from the Supreme Court. It guides that the accused mitigation must both be received and considered as '*it may be heavy with pathos necessitating the Court to consider an aspect of the case that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness*'. The justices of the Supreme Court stated that from accused person's mitigation, the court may understand the pathos on accused part and may be better able to access the appropriate sentence to pass in the case.

16. I have considered the Applicant's mitigation, which he declined to give at the time of trial. I do not blame him for that decision then as it would have mattered little that he gave it at that time since the penalty he faced was mandatory. The Applicant's mitigation is well noted, as I have stated herein above.

17. Having considered all these factors, together with the law and the Applicant's mitigation, I am persuaded that the Applicant should get a term sentence, pursuant to the decision of the Supreme Court in the now famous **Francis Kariko Muruatetu** Case, supra. Consequently, I substitute his earlier sentence of death and replace it in the manner stated in this order:

a. That the Applicant will now serve a term sentence of 15 years imprisonment.

b. The sentence should run from the date of sentence in the trial court case, which is 22nd February, 2010.

DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2020

LESIIT,J.

JUDGE